STATE OF MICHIGAN

COURT OF APPEALS

L. N. LAND COMPANY, INC.,

Plaintiff-Appellee,

v

SCHWARTZ LAW FIRM, P.C., BURTON H. SCHWARTZ, ESQ., and JAY A. SCHWARTZ, ESQ.,

Defendants-Appellants,

and

SCOTT GRIFFIN, INC., SCOTT GRIFFIN, and DWIGHT R. MILLER,

Defendants.

UNPUBLISHED
January 30, 2007

No. 263363
Oakland Circuit Court
LC No. 2002-046065-CK

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendants, the Schwartz Law Firm, P.C., and two of its attorneys, Burton H. Schwartz and Jay A. Schwartz (hereafter collectively referred to as the "Schwartz defendants"), appeal as of right from a judgment awarding plaintiff $435,331.22, following a jury trial, in this legal malpractice action. We affirm.

I. FACTS

The Schwartz defendants represented plaintiff in a real estate transaction that involved plaintiff's purchase of undeveloped property in Genoa Township, Livingston County, Michigan, described as Parcel 2-B2. The property was to be accessed by an easement over an adjoining parcel, described as Parcel 2-B1. However, the Schwartz defendants failed to prepare and record a proper access easement across Parcel 2-B1. The Michigan Department of Transportation (MDOT), without notice of the easement, later acquired parcel 2-B1. The Schwartz defendants admitted at trial that they were negligent, but disputed plaintiff's claim for damages. The jury, by special verdict, determined that plaintiff was entitled to damages of $407,750.

On appeal, the Schwartz defendants challenge the trial court's decisions denying their trial motion for a directed verdict and posttrial motion for judgment notwithstanding the verdict. We affirm the trial court's decision.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on either a motion for judgment notwithstanding the verdict or a motion for a directed verdict, "considering the evidence and all reasonable inferences in a light most favorable to the nonmoving party." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 11; 697 NW2d 913 (2005), citing *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). "If reasonable jurors could have reached different conclusions, the jury verdict must stand." *Id*., citing *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

III. ANALYSIS

"The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). The element at issue here is the requirement of an injury. Plaintiff was required to prove an actual injury caused by the Schwartz defendants' negligence in not recording an easement across Parcel 2-B1, not merely the potential for an injury. *Colbert v Conybeare Law Office*, 239 Mich App 608, 620; 609 NW2d 208 (2000). As with other tort actions, damages must be proven with reasonable certainty. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005).

The trial court's jury instructions did not provide any particular formula for the jury to apply in determining damages, but instructed the jury that it was to determine an amount of damages that reasonably, fairly, and adequately compensated plaintiff for its loss, taking into account the nature and extent of the injury. The jury was also instructed that it was not to compensate plaintiff for any damages resulting from its own failure to use ordinary care to minimize damages. Thus, we decline to speculate into what particular formula the jury might have applied to determine damages. Rather, our concern is whether the evidence, viewed in a light most favorable to plaintiff, provides a reasonable basis for determining damages. See *Health Call of Detroit, supra* at 96.

The relevant time for assessing damages is when MDOT purchased Parcel 2-B1 in October 2000 because, as a purchaser for value without notice of the easement granted for the benefit of Parcel 2-B2, MDOT took the property without the burden of the easement. See *Eitner v Becker*, 272 Mich 386, 391; 262 NW 270 (1935) (an easement passes with a conveyance of the servient estate, "except as against a purchaser for value, without notice"). Further, the parties agree that the diminution in the market value of Parcel 2-B2 attributed to plaintiff's loss of the easement provides a proper measure for determining damages. See *Tillson v Consumers Power Co*, 269 Mich 53, 65; 256 NW 801 (1934) (irreparable or permanent property injury is measured by the difference in market value before and after injury).

Although there are many technical rules for determining value, the jury's determination of value ultimately is not a matter of formulas or artificial rules, but rather a matter of sound judgment and discretion based on the facts of the case. See *In re Widening of Michigan Avenue*, 298 Mich 614, 620; 299 NW 736 (1941). Viewed in a light most favorable to plaintiff, the Schwartz defendants have not established that the evidence lacked a reasonable basis for the jury to determine the diminution in market value.

The Schwartz defendants do not contest the sufficiency of the evidence that enabled the jury to determine the market value of Parcel 2-B2 before the easement was lost through MDOT's acquisition of Parcel 2-B1. With regard to the market value of Parcel 2-B2 after the easement was lost, plaintiff offered sufficient lay testimony regarding the nature of the property and its value for the jury to determine damages.

An appraisal expert is not necessary for a party to establish a property value. *Michigan Mut Ins Co v CNA Ins Cos*, 181 Mich App 376, 385; 448 NW2d 854 (1989); *Grand Rapids v H R Terryberry Co*, 122 Mich App 750, 754; 333 NW2d 123 (1983); see also MRE 701 (lay witness may testify in the form of opinions or inferences that are rationally based on the perception of the witness and helpful to a clear understanding of the testimony or the determination of a fact in issue). In a tort action, value is generally determined based on the value of the market, rather than a personal value to the plaintiff. *Newton Realty Co v Fileccia*, 20 Mich App 674, 676-678; 174 NW2d 603 (1969). A regular market value for damages furnishes the redress that the law seeks to give for the injury. See *Bernhardt v Ingham Regional Med Ctr*, 249 Mich App 274, 280; 641 NW2d 868 (2002). But valuation, by its very nature, is subjective. *Grand Rapids*, *supra* at 755. Where there is no regular market, another means of value may be used so long as it is susceptible to pecuniary measure. *Bernhardt*, *supra* at 280 (value to owner may be used in conversion case where there is no regular market value for the property).

Here, there was evidence that after the easement across Parcel 2-B1 was extinguished, Parcel 2-B2 became inaccessible, except by adjoining property owners. Hypothetically, there may be some buyer willing to purchase inaccessible land, or a buyer might speculate that the land could be resold or accessed in the future. The realities of the modern real estate market are that "speculators are willing to take greater or lesser risks dependent upon the investment potential of the involved property, and to offer concomitant premiums based upon that balancing of degree of risk and potential payoff." *West Jefferson Levee Dist v Coast Quality Constr Corp*, 640 So 2d 1258, 1301-1302 (La, 1994) (Calogero, C.J., dissenting from denial of rehearing). Thus, an investment value could potentially be assigned to the property, although this might not be the highest and best use of the property. See *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 635; 462 NW2d 325 (1990) (property tax case).[1]

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[1] We decline to address plaintiff's cursory argument that it would be impossible to sell Parcel 2-B2 under the Land Division Act, MCL 560.101 *et seq.*, inasmuch as neither plaintiff nor the Schwartz defendants have demonstrated the relevancy of this claim to the evidence presented to the jury for purposes of determining damages. *Prince v MacDonald*, 237 Mich App 186, 197;

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But we are constrained to view the evidence in a light most favorable to plaintiff. Viewed in this manner, the evidence supports a reasonable inference that there was no regular market for Parcel 2-B2, because it could only be accessed by adjoining property owners. The lay opinion of plaintiff's owner, Leonard Nadolski, that Parcel 2-B2 had a zero valuation was based on the lack of access. Although subjective in nature, we reject the Schwartz defendants' argument that it lacked a sufficient explanation for the jury to consider in determining damages.

Moreover, Nadolski's testimony provided a reasonable basis for the jury to evaluate whether adjoining property owners presented a "market" for the property. Viewed in a light most favorable to plaintiff, it established only two adjacent property owners who showed any interest in Parcel 2-B2, namely, MDOT, as the owner of Parcel 2-B1, and plaintiff itself, as the owner of Parcel 1. The reasonableness of Nadolski's conduct in his negotiations with MDOT regarding Parcel 2-B2 and the surrounding properties, after plaintiff's easement over Parcel 2-B1 was extinguished, was for the jury to decide. Considering Nadolski's testimony that MDOT never made an offer for Parcel 2-B2, the jury could reasonably infer that the "market" presented by MDOT had no value. Further, considering the evidence that Parcel 1 could not access Parcel 2-B2 without at least filling in wetlands, the facts surrounding Parcel 1 are relevant to the Schwartz defendants' own burden to prove whether plaintiff failed to mitigate its damages. "At common law, while a plaintiff has the a duty to mitigate his loss, it is the defendant who bears the burden of proving a failure to mitigate." *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994). The evidence did not preclude plaintiff from satisfying its burden of proof at trial, but rather was consistent with Nadolski's testimony that a lack of access rendered Parcel 2-B2 valueless.

In sum, the evidence supports a reasonable inference that Parcel 2-B2 had no value to plaintiff when MDOT's acquisition of Parcel 2-B1 effectively extinguished its access to Parcel 2-B2. Plaintiff met its burden of proving damages with reasonable certainty. Therefore, the trial court properly denied the Schwartz defendants' motions for a directed verdict and judgment notwithstanding the verdict.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette

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602 NW2d 834 (1999); see also *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004) (noting that this Court will not search the record to find factual support for a party's claim); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (stating that issues given cursory treatment may be deemed abandoned).